Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1975

## No. 75-111

BUILDERS ASSOCIATION OF SANTA CLARA-SANTA CRUZ COUNTIES, a California Corporation, individually and for the benefit of its members, *Appellant*,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA, *Appellee*,

CITY OF SAN JOSE, a Chartered City, CITY COUNCIL OF SAN JOSE, NORMAN Y. MINETA, JOSEPH A. COLLA, JANET GREY HAYES, ROY B. NAYLOR, ALFREDO GARZA, JR., SUSAN WILSON and JAMES SELF, as members of the CITY COUNCIL OF SAN JOSE, *Real Parties in Interest*.

## AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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## AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

### INTRODUCTION

In 1971 I was elected to the City Council of San Jose, and continue to serve in that capacity. I have long been a resident of this City, active in its civic affairs and concerned about its future. It is my desire in this brief to present to the Court a viewpoint which it might otherwise not receive.

I am a pharmacist by profession, having no legal training. I ask the Court to bear with my presentation, even though it may lack the polish of a formal legal brief. It is my attempt to act as a true friend of the Court, to advise it of certain factors which may be down played or overlooked by the parties.

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## I

### ANY "CRISIS" WHICH MAY EXIST IN THE SCHOOL SYSTEM IS THE RESULT OF IMPROPER ADMINISTRATION, RATHER THAN LACK OF PLANNING OR EXCESSIVE GROWTH IN THE CITY.

Measure B is the combined product of school administrators and anti-growth advocates who fortuitously came together to create a plan which would foster the interests of each. School administrators, facing the budgetary problems which are the perennial companion of any governmental entity, saw a means of increasing their income and influence by taking an active part in the municipal planning function. Their natural ally in a scheme to extract income from home builders on a "pay as you zone" basis was the anti-growth faction. If the landowner built, he was required to pay the school district; if he did not build, one more family would be denied housing in San Jose.

It is true that, during 1972 and 1973, school overcrowding had become a problem in San Jose. Contrary to the laments of the school districts however, this was not primarily the result of municipal growth. Rather, it was the result of improvident policies on



the part of the school districts themselves, by means of which they created a shortage of which they then complained.

The State of California provides school construction aid to any district which is overcrowded and which has passed school bonds equal to 5% of the assessed valuation of the property within the district. Funds are available, and have been used by school districts to build new classrooms. A two-year projection has been used by the state, under which it commences construction of classrooms two years in advance of the date on which the student is expected to arrive. By so doing, the student is assured of a classroom when he is prepared to go to school.

Despite the availability of this aid, six of the 19 school districts in San Jose qualify as "overcrowded" under the terms of measure B. The reason, according to the consultant employed by the City in connection with the Measure B task force study is "inadequate planning, often by the school district but sometimes by the city . . ." (Livingston and Blayney Report Working Paper No. 1, p. 7).

During the past several years, numerous school buildings within the City of San Jose have been destroyed on the grounds that they were not "earthquake proof", without any provision for replacing them with new school buildings. Although this is not totally the fault of the school district, the destruction of perfectly usable school facilities in a time of rising enrollment is not conducive to coping with additional student loads.

Another reason for inadequate classrooms in San Jose is the hodgepodge of administrations, each attempting to protect its own selfish interests. As Livingston and Blayney point out, "political and legal restraints prevent optimum use of available school space. There are too many school districts (19 in the City) and their boundaries are often illogical". Id. p. 8. This is a problem not only because of the expense of so many duplicated efforts, but also because it results in the closing down of unneeded schools in some districts, while neighboring districts are clamoring for additional classroom space.

According to working paper No. 1, at least 7 of the 19 school districts within San Jose have experienced declining enrollments over the past several years (Livingston and Blayney, pp. 32-35). Many schools in these districts have been closed, while adjacent districts have shunned the alternative of busing children into those districts to use their vacant classrooms. As a result, San Jose is faced with the anomaly that some portions of the city are on double sessions, while others have boarded up schools and classrooms.

Further evidence of the true interests of the school districts is found in the fact that amounts contributed by developers pursuant to Measure B have, in most instances, been placed in the general fund of the school district rather than being allocated to providing classroom facilities for a particular development at a particular school. These amounts are not insubstantial, totaling over $245,000.00 for the period 1973



through 1976 for the 14 agreements with developers studied by the Livingston and Blayney Report on page 24.

If a government entity, such as the school districts, is allowed to create its own "crisis", using this as a means of expanding its power and tax base, a serious question is presented as to whether or not the citizens upon whom this burden falls—builders, contractors, home purchasers, school children—are not deprived of the due process and equal protection of the laws. The San Jose experience will serve as a model for other cities. The importance of this Court's determination, therefore, reaches far beyond the boundaries of San Jose.

If the proper functioning of government is to be rewarded, and waste and inefficiency to be discouraged, then this Court should hear and consider the grave issues raised by this case.

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## II

### MEASURE B IS THE PRODUCT OF THOSE WHO OPPOSE NATURAL URBAN GROWTH AT ANY COST

I am acquainted, either in person or by reputation, with virtually all of the people who participated in the Measure B campaign. They have sought to influence the governmental policies of San Jose for many years. Their basic theme is that San Jose should be preserved for its present residents, and that future residents of the City should be discouraged from coming.

There is some superficial appeal to the idea that this town, or any town, should be preserved for its present residents. The flaw in this philosophy is that it exalts the rights of those who fortuitously happen to be here over the rights of those who have not yet immigrated. This, it would seem, is contrary to the basic precept of our government that all citizens are equal, with equal rights to move into or to leave any geographic area. This right to mobility is one of the major characteristics which distinguishes our system from a totalitarian one, since lack of mobility severely restricts the freedom of an individual to choose a life style, profession, neighborhood and persons with whom he desires to associate.

The motivations of those who oppose further growth in San Jose, are, on their surface, appealing. If increased size causes additional burdens upon our municipal facilities, then stunting the growth of the City will help to relieve this burden.

This philosophy, however, ignores the basic fact that, by preserving the City for those who are already here, the rights of those who are not already here are adversely affected. Surely this Court would have no difficulty seeing the unconstitutionality of such a discrimination if it were based on race or religion. The question, then, is whether a discrimination based on time of arrival is any more constitutional than one based upon racial or religious considerations.

San Jose is part of an integrated urban area, the San Francisco-Oakland Bay Area, comprising nine counties and approximately six million people. It is



not isolated from other towns, but merges into the larger region of the Bay Area. The person excluded from San Jose does not disappear, but rather seeks a home in some neighboring community. The exclusionist policies of San Jose thus affect not only those within its boundaries, but those who live in neighboring communities.

This exclusionary approach has become popular with other Bay Area communities. The more wide spread it becomes, the more difficult it will be to obtain decent housing and jobs, and the more limited will be the choices.

Measure B is an integral part of this exclusionist approach, since it accomplishes its purpose by either avoiding the construction of a house, by reason of the "moratorium" provision, or helps to increase the cost of that house so that persons who would otherwise qualify to purchase it will be unable to do so. Either way, residents—especially those who are less affluent —are excluded from the City.

San Jose has gained an unsavory reputation for such exclusionist policies. It was, after all, this City which was the site for the *Valtiera* case in which this Court ruled unconstitutional a law permitting local residents to exclude low cost housing from their community.

As Professor Deutsch, a Law Professor at a local school, has observed in his article, "Land Use Growth Controls: A Case Study of San Jose and Livermore, California", 15 *Santa Clara Lawyer* 1, 1974:

Another, less attractive, motive behind the support of growth controls has been a desire to exclude low income and minority groups from suburban areas. This motive has raised serious doubts concerning the propriety of growth control movements. Although San Jose has a large Spanish-surname population, it has a small Asian-American population and virtually no black residents. Many, if not most, areas within the city are substantially homogeneous; middle class Anglos live in block after block of suburban tract homes. Some of the support for growth control comes from those who fear further growth will mean an influx of "others" into their neighborhoods. This fear has become especially prevalent among suburban dwellers because of increased pressures from minority communities for access to suburban areas, and because of an increase in federal, state and local programs encouraging the building of low cost housing. This fear was expressed by housing developers and apartment managers in a survey conducted in San Jose as part of a 1972 study of fair housing in Santa Clara County.

Whatever the motives of the proponents, the effect of exclusionist policies in San Jose has been to decrease the supply of available new homes, consequently increasing their price dramatically while decreasing their number and availability especially to the low income, and hence minority population.

In the long run it is a selfish attitude which seeks to deny to fellow citizens the bounty with which we have been supplied. If there were a true crisis of school availability, or of the availability of other



municipal services, the matter might be otherwise. But, since, as I have pointed out above, the school "crisis" was largely the result of misadministration which has largely cured itself with time, such a drastic measure is not justified.

The supposed reason for a two year moratorium on further residential construction was to provide time for the conduct of a "study". Yet such studies have proceeded in the absence of a moratorium with regard to all phases of urban life in San Jose. Moreover, the study in question did not actually get started until more than a year and a half had elapsed after passage of the Ordinance. This further underscores the fact that true interest of the proponents was not to solve the problem, but to simply slow the growth of the City so as to comport with their own political philosophy.

Such a political philosophy, were it to become solidified as a constitutional principle, could be a tool for excluding not only newcomers from a city, but specific groups which tended to immigrate to particular regions. Thus, a moratorium on further growth in a ghetto area could effectively serve to control the minority population of a city. The same is true of other ethnic or religious groups, whose population could be diminished by simply declaring a moratorium for the purpose of studying this or that municipal service problem in the territory where they happen to be congregating.

Anti-growth is not the answer to urban problems. Creative and industrious public servants can meet

and solve these problems. Anti-growth policies simply channel the problems to other cities which may have a more progressive attitude toward meeting and solving the need for municipal services. This Court should not let stand a statute which will encourage other cities to take an ostrich-like approach to urban challenges. Rather, it should inform the City of San Jose, and the supporters of Measure B, that government exists for the purpose of benefiting the citizens, not of perpetuating antiquated and inadequate approaches to urban problems.

In this case the Court is presented with the question of whether a city will be allowed to artificially limit its growth, excluding potential new residents and perpetuating bureaucratic inattention to the continuing need for government to serve its people. This is an important question which relates not only to the rights of the residents of San Jose to have good government, but to the rights of all Americans to demand good government and adequate municipal facilities wherever they desire to live.

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## III

### MEASURE B IS CONTRARY TO GOOD MUNICIPAL PLANNING PRACTICES

San Jose is part of a single urban unit, the San Francisco-Oakland Bay Area. The effects of its ordinances do not stop at its municipal boundaries, and therefore the concerns which shape these municipal ordinances cannot be overly restrictive. Measure B



is unwise and improper municipal planning because it ignores regional interests.

Environmentally, economically, socially and politically, urban areas are becoming more and more homogeneous. Urban planning, if it is to be of any value, must not stop at the city boundaries but must take into account the nature of the region beyond the city boundaries. Exclusionist policies, such as Measure B, constitute a reactionary approach which seeks to ignore modern realities and to consider the individual city as though it exists independently of its surroundings.

It has long been the policy of San Jose to ascertain that adequate municipal services exist before approving a residential development. The City Council, in fact, adopted Policy XIV in January 1973, three months before Measure B was passed. That Policy provided that the City Council *should* deny residential zoning to any proposed project which was not served by adequate schools. Not satisfied with this adopted policy, the school administrators and anti-growth forces pushed through the measure which is now being challenged by this suit.

If regional interests are ignored, then a municipality is allowed to exalt the rights of one segment of the population above those of another. Since the municipality of San Jose is created by the State of California, the State of California is effectively discriminating unfairly between those who are residents of San Jose and those who are excluded from it by Measure B. Such a discrimination would seem to be

contrary to the equal protection provisions of the United States Constitution.

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**CONCLUSION**

San Jose is, by far, the largest city in the United States to adopt a frankly anti-growth ordinance. If the decision of the California Supreme Court is allowed to stand, it will be a signal to other cities that exclusionist policies, with their attendant reactionary effects on urban planning, are appropriate. Other cities will be sorely tempted to solve mounting urban budgetary and service problems by simply excluding new residents. The result will inevitably be a decrease in the quality of urban life in the United States.

The issues presented by this case, both constitutional and political, are at the heart of modern urban life. The Court should not turn its back on these problems, but rather attempt to sort them out in the context of the United States Constitution.

I strongly urge this Court to accept jurisdiction of this case because of the vital constitutional questions involved.

Dated, San Jose, California,
September 11, 1975.

Respectfully submitted,
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